IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

THURSDAY, THE 4TH OCTOBER 2007 / 12TH ASWINA 1929

FAO.No. 286 of 2007()

AGAINST THE ORDER DATED 23/08/2007 IN IA. 1343 /2007 IN OS.116/2007 of SUB COURT, OTTAPPALAM

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APPELLANTS/PETITIONERS

1. PARAMESWARAN NAIR, AGED 73 YEARS,
   S/O. LATE MADATHAKOTHALANGATT LAKSHMI AMMA,
   RESIDING AT KUDALLUR AMSOM, DESOM,
   OTTAPALAM TALUK.

2. DEVAKI, AGED 66 YEARS, D/O. LATE
   MADATHAKOTHALANGATT LAKSHMI AMMA,
   RESIDING AT KUDALLUR AMSOM, DESOM,
   OTTAPALAM TALUK.

BY ADV. SRI.P.SANTHOSH (PODUVAL)
SMT.R.RAJITHA

RESPONDENTS: RESPONDENT

GOVINDANKUTTY NAIR, S/O. LATE
KUNDIKKALPARAMBIL, LAKSHMI AMMA,
KUDALLUR AMSOM AND DESOM, OTTAPALAM TALUK.

BY ADV. SRI.E.R.VENKITESWARAN

THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR ADMISSION ON 04/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.R.RAMAN & V.K.MOHANAN, JJ.

F.A.O.NO.286 OF 2007

Dated this the 4th day of October, 2007

JUDGMENT

Raman, J.

This is an appeal against the order dated 23/8/2007 in I.A.No.1343/2007 in O.S.No.116/2007 on the file of the Sub Court, Ottappalam. Appellants are the petitioners in the said I.A. which was filed under Order XXXIX Rule 1 and 2 for a temporary injunction restraining the lst defendant from committing any act of waste in the suit properties or from alienating the same. The suit is one for partition. The lst defendant is contesting the matter inter alia contending that the plaintiff has no partible right over B schedule item No.5 and that he has entered into an agreement in respect of item No.5 for sale and that he will be put to irreparable loss, if the sale is restrained. Though the order refers to item No.5, it is agreed by the parties that it is only a mistake and the actual item is item No.4. Thus it is item No.4 of B schedule in respect of which sale agreement was entered into by the lst defendant. The court below by the impugned order found that the plaintiff's claim of share of the suit properties is of 22/64 shares. There are various items of properties and item No.4 is 35 cents. Even if that item is alienated, according to the court below, no prejudice will be caused to

the respondent or other sharers and alienation if any can be adjusted towards his share, if that property is found to be partible.

2. This approach of the court below is not correct in law. Plaintiff if ultimately succeeds, he is entitled to partition of all the items including the present item, of course subject to equity and reservation. Therefore, unless equity works out in favour of the party in possession of the said property to reserve that item, the direction that could be adjusted against the property could not have been made at this stage, since that is a matter to be considered at the final stage of the proceedings after considering the entire evidence.

3. In the circumstances and after hearing both sides, there will be an interim injunction restraining the lst defendant from committing any act of waste in the property in his possession and also from alienating those items except item No.4. However item No.4 has since been alienated during the pendency of the proceedings, it is made clear that such alienation by itself will not better the right of the defendant to claim any equity.

Appeal is disposed of as above.

P.R.RAMAN,
Judge.

V.K.MOHANAN,
Judge.

kcv.